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**IN THE
COURT OF APPEALS OF INDIANA**

[illegible]

No. 37A03-0806-CV-361

The Honorable James R. Ahler, Judge
Cause No. 37D01-0406-RS-223

ROBB, Judge

Case Summary and Issue

Carlos Perez appeals the trial court's order granting Aimee Frank's emergency petition to modify custody and awarding her custody of their minor child, T.P. Perez raises a single issue for our review, which we restate as whether the trial court abused its discretion in finding that an emergency exists warranting a change in custody. Concluding that the evidence does not support the trial court's decision, we reverse.

Facts and Procedural History

Perez and Frank met while living in Colorado. Although they never married, their relationship produced a single child, T.P. In July of 2002, Frank relocated with T.P. to Montana where she now resides. Perez remained in Colorado and filed a paternity action seeking custody of T.P. Frank did not participate in the Colorado action. The Colorado trial court entered an order of paternity and granted legal custody of T.P. to Perez;¹ however, T.P. remained in the physical custody of Frank. Sometime thereafter, Perez relocated to Indiana where he now resides.

On June 11, 2004, Perez filed a petition to transfer jurisdiction over the custody of T.P. to Indiana. Frank did not initially take part in this action. The trial court entered an order on July 2, 2004, domesticating the Colorado judgment, ordering Frank to return T.P. to Perez, finding that Frank owed \$3,040 in child support arrearages, and terminating Frank's

¹ Neither the record nor the parties' appendices contain a copy of the Colorado order. In addition, numerous pertinent orders of the trial court have not been presented to this court on appeal, including those dated July 2, 2004, April 25, 2006, and September 17, 2007. The parties' counsel are reminded to comply with Indiana Appellate Rule 50(A)(2)(f), which requires appendices to contain "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal." The omission of these documents has made our review of this case more difficult.

visitation rights until further order. Subsequently, Perez took custody of T.P.

Upon relocating to Indiana, Perez lived for short periods with his parents and his brother until he obtained his own residence in Demotte, Indiana, a duplex home located on 8th Street. Construction was occurring in a field behind the house, which drove mice out of the field and into the duplex. In late May or June of 2007, shortly before the scheduled end of Perez's lease at the duplex, his landlord, Gordon Hill, came to investigate the mouse problem and found between six and ten full trash bags in the garage. Hill further investigated the home finding it to be filthy. Specifically, the floors had not been scrubbed, there were mouse droppings throughout the house, the toilet had not recently been cleaned, and the refrigerator was quite dirty. Hill ordered Perez, who was scheduled to move-out in about three days, to vacate the premises immediately, which he did.

Coincidentally, around this same time, Perez's brother had separated from his wife and could no longer afford the home he was renting located on County Road 950 North. Perez signed an agreement with the landlord to assume his brother's lease and moved into the new residence on July 1, 2007. In the interim between moving out of the residence on 8th Street and moving into the residence on 950 North, Perez and T.P. lived with Perez's sister. When his lease at 950 North ended on November 1, 2007, Perez leased a duplex on 8th Street where he resided at the time of the hearing. No evidence was presented concerning dirty or filthy conditions at either of Perez's latter two residences.

Perez works as a fit welder in Rensselaer, Indiana. His job requires him to be away from home from approximately 5:00 a.m. until 5:30 p.m. While Perez is at work, T.P. is

cared for by Perez's girlfriend, Jill Hamstra; Perez's brother and sister; and a babysitter. When Perez is home, he spends most of his time with T.P. Perez helps T.P. with his homework most nights. Perez's driver's license has been suspended since June 9, 2006. At the hearing, Perez admitted that he has occasionally driven without a valid license with T.P. in the vehicle.

Frank sees T.P. for extended periods of time several times per year. Frank is married and has two other children. Frank's husband works full-time as a miner and Frank works part-time as a certified nurse assistant. Frank's mother-in-law watches the children when they are not in school and both parents are working. Frank testified that when she receives T.P. for visitation, his clothes stink, his hair has not been cut and is unkempt, and she has trouble getting T.P. to eat at the table.

T.P. was seven years old at the time of the hearing. T.P. completed Kindergarten but was deemed to be neither ready to advance to first grade nor deficient enough to warrant being held back for a second year of Kindergarten. Therefore, T.P. was enrolled in a readiness program to help him prepare to enter first grade during the 2008-09 school year. T.P. receives good grades in the readiness program. T.P. has a close relationship with Perez and with Perez's immediate family members. T.P. often stays the night with his aunt, Perez's sister. T.P. is also best friends with the son of his babysitter and the two often play together at each other's houses. T.P. also appears to have a close relationship with Frank's family.

On July 5, 2005, Frank filed a petition to modify visitation. The parties entered into an agreed order signed by the trial court on September 26, 2005, in which they agreed that

Frank would be allowed visitation according to the Indiana Parenting Time Guidelines where distance is a factor, that Frank owed a child support arrearage of \$5,120, and that Frank would pay child support in the amount of \$160 per month plus \$40 per week towards the arrearage.

On November 2, 2005, Frank filed a petition to modify custody. The trial court held a hearing on the motion on April 7, 2006 and denied the motion on April 25, 2006. On May 16, 2006, Frank filed a motion to correct error, and on July 6, 2006, she filed a notice of appeal, which she subsequently withdrew. On September 1, 2006, Frank filed a petition for modification of visitation and for appointment of a guardian ad litem (“GAL”). On April 16, 2007, Frank filed another petition for modification of custody and for appointment of a GAL. The trial court partially granted the motion on May 24, 2007, and appointed a GAL on July 16, 2007. The GAL filed his report on August 7, 2007, concluding that T.P. should remain in the custody of Perez. On that same date, Frank withdrew her motion to modify custody, and the parties stipulated that Frank was now \$7,967.53 in arrears in the payment of child support. The trial court entered an agreed order on September 17, 2007, reflecting the stipulation. On March 13, 2008, Frank filed an emergency petition for modification of custody. The trial court held a hearing on the matter on April 11, 2008, and entered its order the same day finding:

[Frank] has carried her burden of proof by a preponderance of the evidence. The Court further finds that there is an emergency existing to warrant the immediate granting of [Frank’s] Petition to Modify Custody. Based on those findings, the Court now grants [Frank’s] Petition to Modify Custody.

The custody of the minor child, [T.P.], shall be transferred from [Perez] to

[Frank] on April 11, 2008, at 4:30 p.m. local time.

* * *

The Court will issue an order as to payment of child support and the child support arrearage incurred on behalf of [Frank] once the child support worksheets have been filed.

Appellant's Brief at 7. Perez filed a motion to correct error on April 28, 2008, which the trial court denied on May 29, 2008. Perez now appeals.

Discussion and Decision

I. Standard of Review

We review custody modifications for an abuse of discretion, with a preference for granting latitude and deference to trial court judges in family matters. Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). In so doing, we will not re-weigh the evidence or judge the credibility of the witnesses. Leonard v. Leonard, 877 N.E.2d 896, 900 (Ind. Ct. App. 2007). The trial court can observe the parties' conduct and demeanor and listen to their testimony; the value of such close proximity cannot be overstated in the matter of deciding custody, where the trial court is called upon to make Solomon-like decisions in complex and sensitive matters. Pawlik v. Pawlik, 823 N.E.2d 328, 329-30 (Ind. Ct. App. 2005), trans. denied. Therefore, we will set aside the trial court's judgment only when it is clearly against the logic and effect of the facts and circumstances before the trial court. Liddy v. Liddy, 881 N.E.2d 62, 68 (Ind. Ct. App. 2008).

II. Custody of T.P.²

² We point out initially that Frank has made five attempts to secure custody of or modify visitation with T.P. in

The trial court shall determine custody in the best interests of the child with no presumption favoring either parent. Ind. Code § 31-17-2-8. In determining the best interests of the child, the trial court shall consider all relevant factors including: (1) the age and sex of the child; (2) wishes of the child's parents; (3) wishes of the child; (4) interaction and relationship between the child and the child's parents, siblings, and other significant persons; (5) the child's adjustment to home, school and the community; (6) the mental and physical health of all individuals involved; and (7) evidence of a pattern of domestic or family violence. Id. Under Indiana Code section 31-17-2-21(a), a trial court "may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors ... under [Indiana Code section 31-17-2-8]."

The party seeking modification bears the burden of demonstrating that the existing custody order is unreasonable because, as a general proposition, stability and permanence are considered best for the child. In re Marriage of Kenda & Pleskovic, 873 N.E.2d 729, 737 (Ind. Ct. App. 2007). "A petition to modify custody is not a vehicle to relitigate the initial custody determination as to who might make the better parent." Swonder v. Swonder, 642 N.E.2d 1376, 1379-80 (Ind. Ct. App. 1994). Therefore, only a strict showing that the present

less than three years culminating in an "Emergency Petition for Modification of Custody." Appellant's Appendix at 13. Throughout those five attempts, however, Frank's child support arrearage has continued to grow requiring Perez to support T.P. solely on his own income. Frank has made no attempt to demonstrate her inability to pay support at the level ordered or to request a modification of the support order. Thus, while Frank has demonstrated great concern with obtaining custody of T.P., she has shown little concern with supporting him financially while he remains in the custody of Perez. It is impermissible for a trial court to modify a custody award in order to punish a parent, Lamb v. Wenning, 591 N.E.2d 1031, 1033 (Ind. Ct. App. 1992); however, to the extent that Frank complains about the conditions in which T.P. lives with Perez, we acknowledge that her lack of financial support is a contributing factor to those conditions.

custody arrangement is unreasonable will suffice to justify a change in custody. Id. at 1380. We require this strict showing to prevent the disruptive effect of moving children back and forth between parents. Id.

The trial court found “an emergency existing to warrant the immediate granting of [Frank’s] Petition to Modify Custody[,]” and ordered the parties to transfer custody of T.P. from Perez to Frank that same day. The trial court did not make special findings regarding the decision to modify custody. When ordering a modification of child custody, a trial court is not required to make special findings absent a request by a party. Kanach v. Rogers, 742 N.E.2d 987, 989 (Ind. Ct. App. 2001). However, where, as here, the trial court does not make special findings, we review the trial court’s decision under a general judgment standard and will affirm if the judgment can be sustained upon any legal theory consistent with the evidence. In re Paternity of M.J.M., 766 N.E.2d 1203, 1208 (Ind. Ct. App. 2002).

We turn first to the factors listed in Indiana Code section 31-17-2-8. No evidence was presented that T.P.’s age and sex favors one parent over the other or that a substantial change has occurred in T.P.’s development that might favor one parent over the other. Both parent’s wish to have custody of T.P. Given the ongoing nature of this custody battle, there is no evidence of a substantial change in this factor. No evidence was presented of T.P.’s wishes or that those wishes have substantially changed. No evidence was presented regarding the existence of or a substantial change in a pattern of domestic or family violence.

The only evidence presented regarding a change in T.P.’s adjustment to home, school, and community is that T.P. was deemed not ready for first grade and enrolled in a readiness

program. However, no evidence was presented to indicate that this situation was due to T.P. living with Perez. On the contrary, the evidence showed that Perez helps T.P. with his homework most nights. The evidence also shows that it is not uncommon for students, like T.P., who did not attend pre-school to be enrolled in the readiness program. Therefore, there is no evidence of a substantial change with regard to T.P.'s education, nor of an emergency situation.

The bulk of Frank's evidence concerns T.P.'s mental and physical health. Although Frank presented evidence of filthy living conditions at Perez's first duplex home on 8th Street, there is no evidence in the record regarding the duration of such conditions. Further, there is no evidence in the record that such conditions existed at either of Perez's two subsequent residences. Thus, there is no evidence of a substantial change in circumstances, nor of an emergency situation with regard to T.P.'s living conditions. We also point out that Frank's failure to meet her financial obligations to T.P. has done nothing to improve his living conditions.

Frank also presented evidence that when she receives T.P. for visitation, his clothes stink, his hair is unkempt, and he needs a haircut. Frank gave no specific timeline for such occurrences. By contrast, T.P.'s regular care-givers, Hamstra and his babysitter, both testified that T.P. bathes daily and has good personal hygiene. Therefore, there is no evidence of a substantial change in circumstances, nor of an emergency situation with regard to T.P.'s hygiene.

Frank presented evidence that Perez had, on occasion, driven a vehicle without a

license with T.P. as a passenger. While we certainly do not condone such seriously reckless behavior, the evidence presented involved only isolated incidents occurring in the past. Frank presented no evidence of an ongoing, routine practice by Perez of driving with T.P. as a passenger. Rather, the evidence demonstrated that Perez's girlfriend normally drives Perez and T.P. to their destinations. Therefore, there is no evidence of a substantial change in circumstances, nor of an emergency situation with respect to Perez's suspended license.

Frank presented evidence that Perez moves frequently. However, Frank presented no evidence of an adverse impact of such moves on T.P. All three of Perez's recent residences have been in the same town, two on the same street. None of the moves has involved a change of school or displacement from family and friends. Therefore, there is no evidence that the moves constitute a substantial change of circumstances or an emergency situation.

Finally, the court-appointed GAL determined that it would be in T.P.'s best interests to remain with Perez, and Frank presented no evidence of a change in circumstances since the GAL's report. Although Frank alleges that Perez deceived the GAL by feigning residence at his brother's home, the lease signed by Perez two weeks prior to the GAL's appointment definitively refutes such allegations.

While the trial court found the existence of an emergency warranting the immediate transfer of custody of T.P. from Perez to Frank, the evidence does not support such a finding.

In addition, although the trial court treats Frank's petition as one for an emergency change of custody, the trial court did not set the matter for a full custody hearing at a later date. See, e.g., In re Paternity of R.A.F., 766 N.E.2d 718, 728 (Ind. Ct. App. 2002) (trial court "acting

in the face of what was alleged to be, and what the court in fact determined to be, an emergency[, t]he trial court temporarily granted the motion, but set a hearing three weeks later.”); Francies v. Francies, 759 N.E.2d 1106, 1111 (Ind. Ct. App. 2001) (“[T]he very day the emergency order was entered, the trial court set a hearing[,] which was held only thirteen days later.”). The trial court also failed to grant Perez parenting time or visitation with T.P. in its order. Even assuming the trial court treated the hearing as a full evidentiary hearing to determine modification of custody, the evidence does not support finding a substantial change in one of the custody determination factors.

We do not take lightly the decision to reverse the trial court’s judgment or to require the relocation of T.P. from Montana to Indiana. However, the evidence in this case simply does not meet the standard required by Indiana Code section 31-17-2-21. Frank has failed to demonstrate the existence of an emergency requiring the immediate transfer of custody or of a change in circumstances so substantial as to warrant a change in custody.

Conclusion

The evidence does not support the trial court’s finding that an emergency situation exists warranting an immediate transfer of custody of T.P. from Perez to Frank. Therefore, the trial court abused its discretion in modifying the custody of T.P.

Reversed.

CRONE, J., and BROWN, J., concur.